(1)

92-941

No. _____

Supreme Court, U.S.
FILED
NOV 30 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAURA ASHLEY BOTE, a Minor, by and through her Guardian Ad Litem, LINDA ROGERS,
Petitioner,

vs.

SILAS J. THOMAS, M.D.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SEVEN

PETITION FOR WRIT OF CERTIORARI

ANDREW C. SIGAL
Counsel of Record
MARY K. JOSCELYN

6151 Van Nuys Boulevard
Van Nuys, California 91401
(818) 787-6450

Attorneys for Petitioner
LAURA ASHLEY BOTE

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 / (714) 720-1510

QUESTION PRESENTED

1. Is an unborn child denied her fundamental right to a jury trial of her medical malpractice claims when a California statute permits an arbitration agreement to include a waiver of the right to a jury trial which is binding on the minor child by her mother's signature, but which does not mandate that a health care provider explain the language of the arbitration agreement to the expectant mother and which does not afford all patients an equal opportunity to rescind the agreement?

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

TABLE OF AUTHORITIES. v

OPINIONS BELOW. 1

JURISDICTION. 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 8

REASONS FOR ISSUING THE WRIT 11

I. This Court Should Decide Whether The Rights Of An Unborn Child To A Jury Trial Of Prospective Medical Malpractice Claims Are Adequately Protected By A California Statute Permitting The Waiver Of A Jury Trial By An Arbitration Agreement Which Binds The Unborn Child, Via A Parent's Signature, Without Mandating An Explanation Separate From The Agreement And A More Adequate Time Period To Rescind It 11

A. This Court Is Particularly Aware That The Rights Of Unborn Children Should Be Protected 12

B. Where California's Statute Does Not Mandate That The Health Care Provider Separately Explain The Arbitration Agreement To The Unborn Child's Mother, Waiver Of The Unborn Child's Fundamental Right To A Jury Trial Should Not Be Presumed Without Examination By This Court . .13

C. The 30-Day Rescission Period Of The California Statute Arbitrarily Discriminates Between Short-Term Patients And Long-Term Patients, Such As Unborn Children, Which Violates Bote's Right To Equal Protection. 18

II. The Constitutional Right To A Trial By Jury In A Civil Case Is A Fundamental Protection That Should Not Be Whittled Away. 21

CONCLUSION 24

APPENDIX A

Opinion, California Court of Appeal, Second Appellate District, Division Seven, Filed June 22, 1992. . . . . .A-1

APPENDIX B

Denial of Petition For Review, Supreme Court Of The State Of California, In Bank, Filed September 2, 1992. . . . . .B-1

APPENDIX C

Notice Of Ruling, Superior Court Of The State Of California, For The County Of Los Angeles, Dated July 3, 1990 . . . . . .C-1

APPENDIX D

Physician-Patient Arbitration Agreement. D-1

TABLE OF AUTHORITIES

Page

CASES:

Aetna Insurance Co. v. Kennedy
301 U.S. 389 (1937). 15

Parklane Hosiery Co. v. Shore
439 U.S. 322 (1978). 22

Roe v. Wade
410 U.S. 113 (1973). 12, 13

Ross v. Moffitt
417 U.S. 600 (1974). 20

Webster v. Reproductive Health Services
492 U.S. 490 (1988). 12

Woods v. Holy Cross Hospital
591 F.2d 1164 (5th Cir.1979) .14, 15

CONSTITUTION:

United States Constitution
amend. VII. 3, 14, 21

United States Constitution
amend. XIV. 3, 14

California Constitution Art. I,
section 16. . . . . .4, 14, 21

STATUTES:

28 U.S.C. section 1257(3) 2

California Code of Civil Procedure
section 1295 . . . . .13, 22, 23, 24
section 1295(a) 5, 22
section 1295(b) 5
section 1295(c) 6, 20
section 1295(d) 6, 18

Michigan Compiled Law Annotated
section 600.5041(3) 6, 21
section 600.5041(4) 7, 21
section 600.5041(5) 7, 15, 16
section 600.5041(6) 7, 16, 17

PETITION FOR WRIT OF APPEAL

Petitioner, LAURA ASHLEY BOTE, prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, entered in the above-entitled case on June 22, 1992. Said judgment was affirmed by the California Supreme Court when it denied a Petition For Review, entered on September 2, 1992.

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are the parties shown in the caption of the case, LAURA ASHELY BOTE and SILAS THOMAS, M.D.

OPINIONS BELOW

The California Court of Appeal, Second Appellate District, Division Seven reversed the decision of the trial court in an unpublished decision. (Appendix A)

The California Supreme Court denied a Petition for Review. (Appendix B)

The trial court's original ruling was that the subject arbitration agreement did not bind the petitioner. (Appendix C)

JURISDICTION

The California Supreme Court denied the Petition for Review on September 2, 1992. Petitioner invokes this certiorari jurisdiction under 28 U.S.C. Section 1257(3). Petitioner argued below that reversal of the trial court's decision would violate her rights under both the California and the United States Constitutions.

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

U.S. CONST. amend. VII:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

U.S. CONST. amend. XIV, sec. 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

CALIF. CONST. art. I, section 16:

"Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.

"In civil causes the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court. In civil causes in municipal or justice court the Legislature may provide that the jury shall consist of eight persons or a lesser number agreed on by the parties in open court.
"In criminal actions in which a felony is charged, the jury shall consist of 12 persons. In criminal actions in which a misdemeanor is charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court."

CAL. CODE OF CIV. PRO. section 1295:

"(a) Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider shall have such provision as the first article of the contract and shall be expressed in the following language: 'It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.

"(b) Immediately before the signature line provided for the individual contracting for the medical services must appear

the following in at least 10-point bold red type:

'NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.'

"(c) Once signed, such a contract governs all subsequent open-book account transactions for medical services for which the contract was signed until or unless rescinded by written notice within 30 days of signature. Written notice of such rescission may be given by a guardian or conservator of the patient if the patient is incapacitated or a minor.

"(d) Where the contract is one for medical services to a minor, it shall not be subject to disaffirmance if signed by the minor's parent or legal guardian."

MICH. COMPILED LAW ANNOTATED section 600.5041:

"(3) The agreement shall provide that the person receiving health care treatment or his legal representative may revoke the agreement within 60 days after execution by

notifying the health care provider in writing. A health care provider may not revoke the agreement after its execution.

"(4) An agreement under this section shall expire 1 year after its execution and may be renewed by execution of a new agreement.

"(5) The agreement shall contain the following provision in 12-point boldface type immediately above the space for signature of the parties: 'This agreement to arbitrate is not a prerequisite to health care or treatment and may be revoked within 60 days after execution by notification in writing.

"(6) The form of the agreement promulgated shall be accompanied by an information brochure which clearly details the agreement and revocation provision. The brochure shall be furnished the person receiving health care at the time of execution. The person receiving health care shall be furnished with either an original or duplicate original of the agreement."

STATEMENT OF THE CASE

Petitioner, LAURA ASHLEY BOTE (hereafter "BOTE") is the daughter of Linda Rogers (hereafter "ROGERS").

While pregnant with BOTE, ROGERS sought prenatal care from respondent SILAS J. THOMAS, M.D. (hereafter "THOMAS"). This was ROGER'S first pregnancy. ROGERS was accompanied to THOMAS' office by ROGERS' sister, Brenda Rom (hereafter "ROM"). ROM was already receiving prenatal care from THOMAS.

ROGERS' initial visit to THOMAS' office was on January 8, 1988. At this time, she was presented two forms to fill out by a receptionist. One of the forms was entitled "Arbitration Agreement" (Appendix D). No one from THOMAS' office explained the language of the Arbitration Agreement (Appendix D) to ROGERS, nor was

she presented with any explanatory written materials. The California statute in question, governing such agreements does not mandate any explanation.

ROGERS asked ROM to explain the subject Arbitration Agreement (Appendix D). ROM told ROGERS only that if ROGERS did not sign the form, THOMAS would provide prenatal care but would not deliver ROGERS' baby.

When ROGERS' delivered BOTE, on June 21, 1988, at St. Francis Medical Center (not a party to this proceeding), BOTE sustained a brain injury resulting in cerebral palsy and right hemiplegia.

BOTE has initiated a legal action against THOMAS and St. Francis Medical Center, claiming that her injuries are the result of medical malpractice.

THOMAS seeks to enforce the subject Arbitration Agreement (Appendix D), signed by ROGERS, but not by BOTE, to bind BOTE to arbitrate her action against THOMAS and to waive BOTE'S right to a trial by jury.

BOTE asserted her right to a jury trial under both the California and the United States Constitutions in her reply to THOMAS' appeal of the trial court's decision, raising this federal question.

BOTE now petitions this Court to determine whether the California statute under which the subject agreement was drafted violates BOTE'S fundamental right to a trial by jury because the statute does not adequately protect the rights of the unborn.

The statute does not mandate that the Arbitration Agreement (Appendix D),

which includes a waiver of a right to a trial by jury, be explained by the health care provider to a pregnant mother. Similar statutes in other states contain such a requirement, and also allow a longer period within which to rescind the agreement.

REASONS FOR ISSUING THE WRIT

I.

THIS COURT SHOULD DECIDE WHETHER THE RIGHTS OF AN UNBORN CHILD TO A JURY TRIAL OF PROSPECTIVE MEDICAL MALPRACTICE CLAIMS ARE ADEQUATELY PROTECTED BY A CALIFORNIA STATUTE PERMITTING THE WAIVER OF A JURY TRIAL BY AN ARBITRATION AGREEMENT WHICH BINDS THE UNBORN CHILD, VIA A PARENT'S SIGNATURE, WITHOUT MANDATING AN EXPLANATION SEPARATE FROM THE AGREEMENT AND A MORE ADEQUATE TIME PERIOD TO RESCIND IT

A. This Court Is Particularly Aware That The Rights Of Unborn Children Should Be Protected

In Webster v. Reproductive Health Services, 492 U.S. 490 (1988), this Court's discussion at 504-507 considered the preamble to a Missouri statute regulating abortion.

This Court declined to decide the constitutionality of the preamble which defined human life as beginning at conception, and commented that the preamble appeared to merely express a "value judgment" rather than restrict a person's conduct. Id. at 506.

It was also noted in Webster that state courts offer protections to unborn children through various tort and probate laws. Id. (citing Roe v. Wade, 410 U.S. 113 (1973) at 161-162.)

In cases involving the question of abortion, this Court has not hesitated to examine State statutes and address the State's compelling interest in protecting a potential human life. Roe v. Wade, supra at 165 and cases following it.

This Court is now urged to examine California Code of Civil Procedure section 1295 which permits health care providers to request patients to agree to waive the right to a jury trial and arbitrate prospective medical malpractice claims.

B. Where California's Statute Does Not Mandate That The Health Care Provider Separately Explain The Arbitration Agreement To The Unborn Child's Mother, Waiver Of The Unborn Child's Fundamental Right To A Jury Trial Should Not Be Presumed Without Examination By This Court

The Seventh Amendment to the United States Constitution ensures the right to a jury trial in civil cases.

While it is true that this amendment does not automatically extend this right to civil trials in State courts [see Woods v. Holy Cross Hospital, 591 F.2d 1164, 1171, at footnote 12, (5th Cir.1979)], the California Constitution, Article I, section 16, extends the right to a jury trial to its citizens. Additionally, the Fourteenth Amendment of the United States Constitution protects BOTE'S right in a State proceeding to due process.

As with federal civil cases, this Court is requested to treat BOTE'S "inviolate" right under the California Constitution as a fundamental right and to "indulge every reasonable presumption

against waiver." Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937).

Absent the protections afforded by similar statutes in other States, petitioner is convinced that the circumstances surrounding her mother's signature on the subject Arbitration Agreement (Appendix D) was not a valid waiver, and violated BOTE'S rights to due process.

Some States, such as Florida, have attempted to alleviate the purported medical malpractice insurance crisis by enacting mandatory mediation procedures. Woods, supra at 1167-1168. These efforts do not require a patient to waive his/her right to a jury trial. Id. at 1177.

A similar statute enacted by the State of Michigan provides in pertinent part:

> "(5) The agreement shall contain the following provision in 12-point boldface type immediately above the space for signature of the parties: 'This agreement to arbitrate is not a prerequisite to health care or treatment and may be revoked within 60 days after execution by notification in writing.'
>
> "(6) The form of the agreement promulgated shall be accompanied by an information brochure which clearly details the agreement and revocation provision. The brochure shall be furnished the person (sic) receiving health care at the time of execution. The person receiving health care shall be furnished with either an original or duplicate original of the agreement." Mich. Compiled Law Annotated section 600.5041(5)(6).

These two sections afford greater protection against an involuntary or mistaken waiver of the right to a jury trial. The rescission period is longer and is conspicuously placed near the signature line.

More importantly, an information brochure explaining the agreement and cancellation thereof must be provided to the patient. Mich. Compiled Law Annotated sec. 600.5041(6).

Apparently, because BOTE had the misfortune to be born in California instead of Florida or Michigan, her mother could more easily make a mistaken waiver of BOTE'S right to a jury trial, denying BOTE her right of due process.

The California statute, as enacted, unfairly denies unborn children their due process rights to a trial by jury. The California statute does not mandate that the arbitration agreement be explained to the expectant mother.

C. The 30-Day Rescission Period Of The California Statute Arbitrarily Discriminates Between Short-Term Patients And Long-Term Patients, Such As Unborn Children, Which Violates Bote's Right To Equal Protection

In California, unborn children, once born, are non-signatory minors who are nevertheless bound by the statutory arbitration agreement. California Code of Civil Procedure section 1295(d).

Although the subject Arbitration Agreement (Appendix D), drafted in general accordance with the statute but with minor, albeit, significant modifications, allows for rescission of the agreement within 30 days of the date of signing, it does not afford an unborn child any protection against an involuntary waiver of the right to a jury trial. In almost all instances involving prenatal medical care, the critical

medical treatment will be rendered to the minor well beyond the 30-day period cancellation period. Thus, effectively precluding the mother's ability, on behalf of a minor injured during childbirth, to have a jury render a verdict in a medical malpractice action.

The rescission provision of the California statute does not afford all patients who sign an arbitration agreement an equal opportunity to rescind their waiver of a jury trial. Lucky short-term patients, such as a surgery patient, have an opportunity to receive treatment and discover a claim for medical malpractice, prior to the expiration of the 30-day period.

Long-term patients, and especially unborn children, do not have an equal opportunity to cancel such an agreement.

Under the California statute, the long-term patient must roll the dice, consult a crystal ball or decide whether to take the chance that, once the 30-day period has long passed, the critical medical care will be administered without negligence.

Therefore, California Code of Civil Procedure section 1295(c) violates petitioner's right of equal protection under the law because the rescission clause

> "emphasizes disparity in treatment by a State between classes of individuals whose situations are arguable indistinguishable." Ross v. Moffitt, 417 U.S. 600, 609 (1974).

The Michigan statute mentioned above illustrates a type of statute which is less discriminatory. The Michigan statute affords a 60-day rescission

period, and the agreement expires after one year. Mich. Compiled Law Annotated section 600.5041(3)(4).

This Court is strongly urged to grant this petition to examine the California statute which controls the subject Arbitration Agreement, in order to decide whether it violates BOTE'S right to equal protection under the law.

II.

THE CONSTITUTIONAL RIGHT TO A TRIAL BY JURY IN A CIVIL CASE IS A FUNDAMENTAL PROTECTION THAT SHOULD NOT BE WHITTLED AWAY

Both the Seventh Amendment to the United States Constitution and Article 1, section 16 of the California Constitution grant civil litigants the right to have their claims heard by a jury. The importance of this right has been recognized by this Court:

> "The founders of our nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign or, it might be added, to that of the judiciary." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1978).

In the pending cause, there is an attempt to deprive BOTE of this most basic of rights by implication. Assuming, arguendo, that ROGERS is bound by the subject Arbitration Agreement (Appendix D), the California Court of Appeal decision (Appendix A) has permitted THOMAS to, in effect, modify California Code of Civil Procedure section 1295 to fit his own personal desires.

Article 1 of the subject Arbitration Agreement (Appendix D) parrots the language of section 1295(a) of the

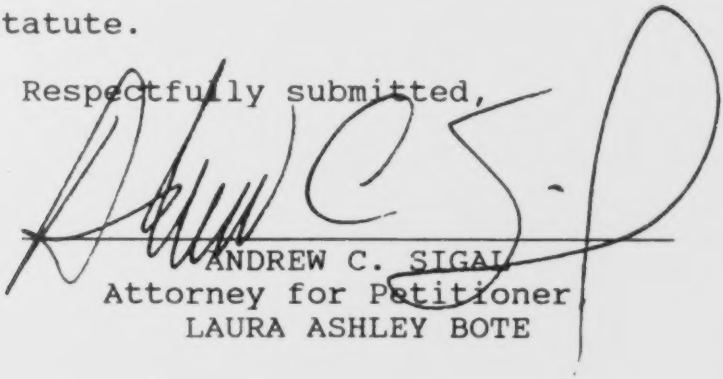
California Code of Civil Procedure. At best, this applies to ROGERS. THOMAS goes on to expand the meaning of said article by adding Article 2 to the subject Arbitration Agreement (Appendix D). In Article 2, THOMAS seeks to include the "spouse or heirs . . . any children, whether born or unborn" of the patient in the parameters of Article 1. He also extends the meaning of "patient" to encompass "the mother and the mother's expected child or children."

California Code of Civil Procedure section 1295 does not use the words "fetus" or "unborn child or children" or words to that effect. In essence, the Court of Appeal has permitted THOMAS to act as a legislature unto himself.

CONCLUSION

The subject Arbitration Agreement was drafted in general accordance with a California statute. This statute, Code of Civil Procedure section 1295, does not adequately protect an unborn child's fundamental right to a trial by jury. This Court is strongly urged to grant BOTE'S petition for a Writ of Certiorari to examine the constitutionality of the State statute.

Respectfully submitted,



ANDREW C. SIGAL
Attorney for Petitioner
LAURA ASHLEY BOTE

APPENDIX A

NOT TO BE PUBLISHED.

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LAURA ASHELY BOTE, a Minor, by Linda Rogers, her Guardian Ad Litem,

Plaintiff and Respondent,

v.

SILAS J. THOMAS, M.D.,

Defendant and Appellant.

No. B052852

(Super.Ct.No. SCC24465)

COURT OF APPEAL-SECOND
FILED
JUN 22 1992
Joseph A. Lane Clerk

APPEAL from an order of the Superior Court of Los Angeles County. Kenneth Gale, Judge. Reversed with directions.

La Follette, Johnson, De Haas & Fesler, Louis De Haas, Schmid & Norek, Susan Schmid, Gordon T. Ownby, Thelen, Marrin, Johnson & Bridges, Curtis A. Cole and Teresa J. Hermosillo for Defendant and Appellant.

Andrew C. Sigal and Lawrence A. Chusid for Plaintiff and Respondent.

Defendant appeals from an order denying his petition to compel arbitration of plaintiff's complaint pursuant to an arbitration agreement ("Agreement") signed by plaintiff's mother. The complaint alleges that defendant, the obstetrician/gynecologist who delivered plaintiff, committed medical malpractice prior to and during plaintiff's birth. The trial court found that plaintiff was not bound by the Agreement. We disagree and reverse.

FACTUAL AND PROCEDURAL SYNOPSIS

Respondent, through her guardian ad litem, filed a complaint on September 11, 1989. The complaint alleges that defendants St. Francis Medical Center (not a party to this appeal) and appellant negligently rendered medical care to Linda Rogers ("Rogers") and her child, respondent Laura Bote, prior to and during respondent's delivery on June 21, 1988, which caused respondent's paralysis and brain damage.

Appellant began treating Rogers for prenatal care on January 8, 1988. He saw her numerous times for prenatal care, delivery of respondent and post-natal care until August 2, 1988.

At Rogers' initial visit, she was given a physician-patient arbitration agreement, which she signed and dated.

She admits doing so. The Agreement contains language mandated by Code of Civil Procedure section 1295.[1] Rogers was seeking routine prenatal care at the time she signed the Agreement, and the circumstances of her office visit did not constitute an emergency. Rogers never attempted to revoke the Agreement.[2]

Respondent opposed the petition to compel arbitration on the grounds that the Agreement was a contract of adhesion, that it had been signed upon coercion, and that no one explained its provisions to Rogers.

---

1 All statutory references are to the Code of Civil Procedure.

2 Article 5 of the Agreement provides that: "This agreement may be revoked by written notice delivered to the physician within 30 days of signature and if not revoked will govern all medical services received by the patient."

In reply, appellant filed a declaration indicating that Rogers satisfactorily completed patient registration and medical history forms at the time of her initial visit and was alert and oriented and capable of answering questions completely and participating in her examination.

Citing Weeks v. Crow (1980) 113 Cal.App.3d 350, the court denied the petition on the ground that because respondent was not a party to the Agreement, it was not binding on her.

Appellant filed a timely notice of appeal.

DISCUSSION

I. An arbitration agreement contained in a contract for prenatal care and delivery of a child and signed by the mother receiving the medical care, may bind the unborn child to its terms.

California has a strong public policy favoring arbitration over litigation as a speedy and relatively inexpensive means of dispute resolution which eases court congestion. (Gross v. Recabaren (1988) 206 Cal.App.3d 771, 775.)

Because the scope of arbitration is a matter of agreement between the parties, the court should attempt to give effect to their intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made. (Id., at p. 777.) Any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration. (Ibid.)

"[T]he Legislature has codified the right to voluntary arbitration of medical

malpractice claims and has declared that agreements to arbitrate, when drafted in a prescribed form, are not unconscionable nor are they contracts of adhesion." ([section] 1295, subd. (e).)" (Hilleary v. Garvin (1987) 193 Cal.App.3d 322, 325.)

In the instant case, Linda Rogers, respondent's mother signed the Agreement which contained the following mandatory language prescribed by section 1295:

> "It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California Law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into

> it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration."

As further required by section 1295, the contract contains the following warning in 10-point bold red print immediately above the signature line:

> "NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL."

A parent clearly has the authority to bind her child to arbitrate claims related to medical services for the child. (Doyle v. Giuliucci (1965) 62 Cal.2d 606, 610.) Citing Doyle, appellate courts later held that a parent also has the authority to bind her unborn child to arbitrate such claims. (Wilson v. Kaiser Foundation Hospitals (1983) 141

Cal.App.3d 891, 899; Bolanos v. Khalatian (1991) 231 Cal.App.3d 1586, 1591.)

Without expressly stating so, respondent suggests that we should not follow Bolanos because it misapplied Wilson. Respondent argues that the critical factor in Wilson for deciding that the unborn child was bound by the arbitration agreement was the fact that upon his birth, the child became a member of a group health care plan, and therefore Wilson should not have been applied to a situation, such as that in Bolanos and here, not involving a group health care plan.

We disagree that the existence of a group health plan is a limiting factor. First, section 1295 is not limited to group health care plans, but applies to "[a]ny contract for medical services

which contains a provision for arbitration." ([section] 1295, subd. (a).) Second, in Wilson, the court focused on the relevant provisions of the agreement in order to decide whether the child was bound by the arbitration provision. (Wilson v. Kaiser Foundation Hospitals, supra, 141 Cal.App.3d 891, 895.) We conclude that whether an arbitration provision is contained in a health care plan or a single contract between a patient and physician is irrelevant, but instead appellate review focus must be on the language of the specific arbitration provision to determine whether or not a particular party is bound by the agreement.

In denying appellant's petition to compel arbitration, the trial court cited Weeks v. Crow, supra, 113 Cal.App.3d 350

and found that respondent was not a party to the Agreement. However, that Weeks recognizes the possibility of arbitrating a child's claim for medical malpractice for prenatal or birth injuries can be seen in its statement that: "Even though Mrs. Weeks was entering the hospital to give birth, the agreement contains no reference at all to the expected child; only the expectant mother is named as the patient. If the parties had intended to agree to arbitration of claims of negligence in treating the child, they could easily have done so by also naming the expected child as patient. The omission of any reference to the child expresses an intention not to apply the agreement to malpractice claims arising out of medical services rendered to the child." (Id. at p. 353.)

Unlike the agreement in Weeks, we conclude that the language of the Agreement here evidences an intent to include claims for medical malpractice by a child who had not yet been born at the time the agreement was signed. The Agreement contained the following provision:

> "'Article 2: **All Claims Must Be Arbitrated.** It is the intention of the parties that this agreement bind all parties whose claims may arise out of or relate to treatment or services provided by the physician including any spouse or heirs of the patient and any children, whether born or unborn, at the time of the occurrence giving rise to any claim. In the case of any pregnant mother, the term 'patient' herein shall mean both the mother and the mother's expected child or children.' (Emphasis added.)"

In Bolanos, based on a provision containing the exact same language as Article 2 of the Agreement here, the

court determined that the agreement made it clear that it was intended to bind all parties, including a child not yet born, whose claims arose out of or related to the treatment provided to the mother. (Bolanos v. Khalatian, supra, 231 Cal.App.3d 1586, 1591.) We likewise conclude that the Agreement applies to respondent's claims for malpractice as those claims arose out of the medical services rendered by appellant.

II. Respondent is not entitled to an evidentiary hearing to determine whether her mother's signature on the Agreement was knowing and intelligent.

Respondent contends that an evidentiary hearing must be held to determine if her mother's signature on the Agreement was knowing and intelligent. Respondent cites Ramirez v. Superior Court (1980) 103 Cal.App.3d 746,

756, for the proposition that when an agreement is executed without the signor knowing of the arbitration provision or the significance of such a provision, section 1295 is inapplicable.

The Ramirez court concluded that the Legislature might not establish a conclusive presumption that one signing an agreement meeting the requirements of section 1295 had in fact consented to arbitration, but rather section 1295 permitted a very limited species of attack by such a person. (Id., at pp. 755-756.) The court concluded that section 1295 should be read "as permitting a party to seek to show that he or she was coerced into signing or did not read the many waiver notices provided and did realize that the agreement was an agreement to arbitrate." (Id., at p.

756.) Respondent introduced not evidence that her mother was coerced into signing the Agreement, that her mother did not read the waiver notices or that her mother did not realize that the Agreement was an agreement to arbitrate.

In opposition to the petition to compel arbitration, Linda Rogers (respondent's mother) declared that: (1) Appellant gave her a few forms to sign on her initial visit, including the Agreement; (2) no one in appellant's office explained the Agreement or its implications to her; (3) her sister told her the Agreement had to be signed in order for appellant to deliver the baby, otherwise appellant would provide only prenatal care; (4) she was covered by Medi-Cal, (sic) (5) she had a high school

education; and (6) she felt she had no alternative but to sign.

"[W]hether a contract provision is clear and unambiguous is a question of law, not of fact." (Hulsey v. Elsinore Parachute Center (1985) 168 Cal.App.3d 333, 340.) Where the language of an agreement is designed to put a layperson on notice of the significance and legal effect of signing it, it will be upheld. (Id., at p. 341.)

"When a person with the capacity of reading and understanding an instrument signs it, he may not, in the absence of fraud, coercion or excusable neglect, void its terms on the ground he failed to read it before signing it." (Bolanos v. Khalatian, supra, 231 Cal.App.3d 1586, 1590.)

Unlike the circumstances in Ramirez, in the instant case, the Agreement was a separate form, presented to Rogers during her initial office visit, Rogers was seeking routine prenatal care. Appellant indicated that Rogers was able to complete a medical questionnaire and personal information forms. Rogers also believed that she could obtain immediate treatment without signing the agreement, and there was no language barrier. Rogers did not state that she had not read the Agreement or that she did not understand it. Moreover, the fact that Rogers asked her sister about the provision indicates that she was aware of its significance. Finally, Rogers did not revoke the Agreement as permitted by Article 5.

The facts of this case are very similar to those in Bolanos. In Bolanos, the court concluded that: "[U]nder the circumstances present here, Inez Chavez is bound by the arbitration agreement. First, we note that her declaration does not say that she could not read or understand the agreement; only that she is able to read 'only limited Spanish' and that she does not remember signing it. We note also the she (sic) does not offer any evidence that she was forced or tricked into signing the agreement. Her statement that '[she] was given several documents to sign by persons at [appellant's] office before [she] could receive medical treatment,' is insufficient to establish that she was coerced to sign the agreement or that she signed the agreement because of excusable

neglect. [Citation.] Her visit on October 5, 1988, was a routine office visit for a prenatal examination. Completing forms . . . is a regular and normal procedure on an initial visit to a physician. There is not suggestion that her physical condition was such that she required immediate medical attention or that she involuntarily signed the document in order to receive any urgent medical treatment." (Id., at pp. 1590-1591.)

Accordingly, respondent not having introduced any evidence of fraud, coercion or excusable neglect, there is no need for an evidentiary hearing to determine whether Rogers' consent was knowing and understanding.

DISPOSITION

The order denying appellant's petition to compel arbitration is reversed and the court is ordered to enter a new and different order granting said petition and staying the superior court action. Appellant is awarded costs on appeal.

NOT TO BE PUBLISHED.

WOODS (Fred), J.

We concur:

LILLIE, P.J.

JOHNSON, J.

APPENDIX B

Second Appellate District, Division Seven
No. B052852
S027943

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

==========

LAURA ASHELY BOTE, A Minor, Etc.,
Respondent

v.

SILAS J. THOMAS, M.D., Appellant

==========

Respondent's petition for review DENIED.

SUPREME COURT
FILED
SEP - 2 1992

Robert Wandruff
H. Cruz
DEPUTY

Lucas
Chief Justice

APPENDIX C

GORDON T. OWNBY
SCHMID, NOREK & MILLER
3550 Wilshire Boulevard, Suite 1280
Los Angeles, California 90010
Telephone: (213) 251-0700
State Bar No. 128568

Attorneys for Defendant,
SILAS J. THOMAS, M.D.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

LAURA ASHELY BOTE,

Plaintiff,

v.

ST. FRANCIS MEDICAL CENTER, et al.,

Defendants.

CASE NO. SCC 24465

NOTICE OF RULING

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on June 26, 1990, at 1:30 p.m. in Department A of the above-entitled court, defendant Silas Thomas, M.D.'s (sic) petition for an order requiring arbitration and motion to

stay action came on regularly for hearing before the Honorable Kenneth Gale, Judge Presiding.

Gordon T. Ownby and Thomas McCarthy appeared for defendant Silas Thomas, M.D. (sic); Martin Koczanowicz appeared for plaintiff Laura Ashley Bote; Lisa Golden appeared for defendant St. Francis Medical Center.

After consideration of the moving and opposing papers and submitted evidence, and after hearing oral argument, the court denied the petition.

The court also denied moving party's request for a statement of decision duly requested pursuant to Code of Civil Procedure section 1291.

DATED: July 3, 1990

SCHMID, NOREK & MILLER

By_____/s/_____
GORDON T. OWNBY
Attorneys for Defendant, SILAS THOMAS, M.D.

APPENDIX D

PHYSICIAN-PATIENT ARBITRATION AGREEMENT

"Article 1: **Agreement to Arbitrate:** It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.

"Article 2: **All Claims Must be Arbitrated:** It is the intention of the parties that this agreement bind all parties whose claims may arise out of or relate to treatment or services provided by the physician including any spouse or heirs of the patient and any children, whether born or unborn, at the time of the occurrence giving rise to any claim. In the case of any pregnant mother, the term 'patient' herein shall mean both the mother and the mother's expected child or children."